

82-939

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ALEXANDER I. STEVAS
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ROBERTO REQUENA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT**

GARLAND W. WATT
LAW OFFICES OF GARLAND W. WATT
400 South Dearborn Street
Suite 500
Chicago, Illinois 60605
(312) 663-1440

Counsel for Petitioner

QUESTIONS PRESENTED

Whether Petitioner's Fourteenth Amendment due process and equal protection rights were violated when a criminal trial court applied the Illinois Rape Shield Statute, Section 115-7(a) of the Criminal Code (Ill.Rev.Stat. 1981, ch. 38, par. 115-7(a)) to restrict effective cross-examination of a crucial witness.

LIST OF PARTIES TO PROCEEDINGS

The parties to the proceedings below include Petitioner, the People of the State of Illinois and co-Defendants Joseph and Michael Martinez.

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NO.
IN THE
SUPREME COURT OF THE UNITED STATES
December Term, A.D. 1982

ROBERTO REQUENA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

Petitioner, Roberto Requena,
respectfully prays that a Writ of
Certiorari issue to review the judgment
and opinion of the Appellate Court of
Illinois, First District.

OPINIONS BELOW

The judgment of the Circuit Court of Cook County is not reported. The Opinion of the Appellate Court is reported at 105 Ill.App.3d 831, 61 Ill.Dec. 636, 435 N.E.2d 125 (1982). The Opinion of the Appellate Court is

included as Appendix "A" to this Petition. The Order of the Supreme Court of Illinois denying the Petition for Leave to Appeal without opinion is not officially reported. The letter from the Supreme Court of Illinois denying the Petition for Leave to Appeal is included as Appendix "B" to this Petition.

JURISDICTION

The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on October 5, 1982. The Judgment of the Appellate Court of Illinois, First District was entered on March 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). 28 U.S.C. Section 2403(b) may be applicable to this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the
Constitution of the United States:

" . . . Nor shall any State
deprive any person of life,
liberty, or property,
without due process of law;
nor deny to any person
within its jurisdiction
the equal protection of
the laws."

Sixth Amendment to the Constitution
of the United States:

" In all criminal
prosecutions, the accused
shall enjoy the right . . .
to be confronted with the
witnesses against him . . ."

STATEMENT OF THE CASE

On August 6, 1978, Petitioner
Roberto Requena was arrested along with
Michael and Joseph Martinez on the
charges of aggravated kidnapping,
deviate sexual assault, and rape. Prior
to these charges, Petitioner Requena,

an honors graduate of a State University, had never been arrested.

At trial, the State's evidence showed that after drinking in a bar from 10:00 p.m. to 3:30 a.m., the Complainant and a person admittedly her boyfriend drove to a secluded beach behind a local utility plant. The Complainant and her boyfriend remained parked from approximately 4:00 a.m. to 5:15 a.m.

The State introduced evidence of the presence of human spermatozoa in the Complainant's vagina. Spermatozoa can remain in a woman's vagina for up to fourteen (14) hours after its deposit.

The trial court then applied the Illinois Rape Shield Statute to restrict defense cross-examination of the Complainant as to her sexual activity

during that fourteen (14) hour period. The defense was not permitted to cross-examine the Complainant as to her presence in the middle of the night at a secluded beach with a man admittedly her boyfriend. Neither was the defense permitted to cross-examine the prosecutrix as to whether an Intra Uterine Device (IUD) was in place in her uterus and vagina in the fourteen (14) hour period prior to the taking of the slides which showed spermatozoa present in her vagina.

The application of the Rape Shield Statute by the court to restrict that line of questioning is particularly significant in light of the fact that the Petitioner was rendered temporarily impotent at some time during the fourteen (14) hour period in which the spermatozoa was viable. The Petitioner

testified that on August 6, 1978, he asked the Complainant to have sexual intercourse with him. Despite the consent of the Complainant, the nervousness of the Petitioner resulted in his inability to maintain an erection of his penis with which he could vaginally penetrate the Complainant.

On Appeal to the Appellate Court of Illinois, Petitioner argued that the application of Ill.Rev.Stat. Ch. 38, par. 115-117(a) (hereinafter Rape Shield Statute) by the trial court was in error in that (a) the statute is unconstitutional on due process and equal protection grounds, and (b) the statute was applied unconstitutionally in this case to exclude relevant evidence that is beyond the scope of the statute.

In affirming Petitioner's conviction the Appellate Court said:

The trial court excluded this evidence under section 115-7(a) of the Criminal Code (Ill.Rev.Stat. 1979, ch. 38, par. 115-7(a)) which provides:

"In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused."

This statute was challenged on due process grounds in *People v. Cornes* (1980), 80 Ill.App.3d 166, 35 Ill.Dec. 818, 399 N.E.2d 1346. In *Cornes*, the court noted that the statute neither precluded cross-examination of a complainant nor prevented the defendant from attacking complainant's credibility and veracity. The statute merely denied a defendant the opportunity to harass and humiliate the complainant. Therefore, the court found the statutory evidentiary

restrictions did not violate defendant's due process rights. On the basis of Cornes, we find defendant's due process argument to be without merit.

No Illinois court has addressed the issue of whether the statute violates equal protection rights. However, in *Cherry v. State* (1981) Ind.Sup.Ct., 414 N.E.2d 301 and *Finney v. State* (1979), Ind.App.Ct., 385 N.E.2d 477, the statute survived an equal protection challenge. The courts reasoned that because a defendant in a rape case is not within a suspect classification, the equal protection clause requires only that the statute be rationally related to a legitimate state purpose. The courts then found that the statute was a rational attempt by the legislature to protect the complainant from harassment and humiliation and encourage victims of sexual assaults to report the crimes without fear of having their past sexual activities brought before the public. We agree with the rationale in *Cherry* and *Finney* and find that section 115-7 of the

Illinois Criminal Code does not violate defendant's equal protection rights. (Emphasis added)

People v. Reguena,
(First District 1982), 105
Ill.App.3d 831, 61 Ill.Dec.
636, 435 N.E.2d 125, 128.

(Appendix "A", pp. 5-7)

The federal question sought to be reviewed was raised in the Appellate Court of Illinois in Petitioner's brief by his argument that "the enforcement by the trial court of the Rape Shield Statute was error in that the statute is unconstitutional on equal protection and due process grounds and the statute was applied in this case to exclude relevant evidence which is beyond the scope of the statute."

In his Petition for Leave to Appeal to the Illinois Supreme Court Petitioner relied on the constitutional protections

afforded Defendants in Davis v. Alaska, 415 U.S. 308 (1974). The Appellate Court of Illinois, in its decision relied on People v. Cornes, (5th District, 1980) 30 Ill.App.3d 166, 35 Ill.Dec. 818; Cherry v. State, (1981) Ind.Sup.Ct., 414 N.E.2d 301; and Finney v. State, (1979), Ind.App.Ct., 385 N.E.2d 477, to hold that Petitioner's due process and equal protection argument is without merit.

A Petition for Leave to Appeal to the Illinois Supreme Court was denied on October 5, 1982.

REASONS FOR GRANTING THE WRIT

PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT APPLIED THE RAPE SHIELD STATUTE TO RESTRICT CROSS-EXAMINATION OF A CRUCIAL STATE WITNESS.

This case presents an issue which mirrors the issue addressed by this Court in Davis v. Alaska, 415 U.S. 308 (1974). Petitioner contends that his Sixth Amendment right to effective cross-examination (Davis), incorporated by and applicable to the states by the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965), Smith v. Illinois, 390 U.S. 129 (1968), was violated when the trial court applied Ill.Rev.Stat. (1981), ch. 38, paragraphs 115-17(a) to restrict cross-examination of the Complainant.

In Davis, the trial court applied a juvenile statute to prevent any

reference by the defense in the course of cross-examination to the fact that a crucial state witness was on probation at the time he originally identified the defendant and was biased or had a motive to testify. The goal of the defense's line of questioning was to show hasty or faulty identification to shift suspicion away from himself or that the witness might have been subject to police pressure and fear of probation revocation. The goal of the defense question was not to harass or embarrass the State's witness.

In the instant case, the defense counsel sought to show not the bad character of the Complainant but her sexual activity within a specified pertinent period of time. Semen can remain in a vagina for fourteen (14) hours. Moenssens, Andre A.; Moses,

Ray and Inbau, Fred, SCIENTIFIC EVIDENCE IN CRIMINAL CASES, Foundation Press, Mineola, New York (1973), p. 264. Questions covering that period of time are necessary to establish or limit the significance of the presence of semen. Defense counsel was permitted only one question of the prosecution as to whether the Complainant had sexual intercourse with her boyfriend in the car. That one question was inadequate to establish the sexual activity of the Complainant in that fourteen (14) hour period before the presence of spermatozoa was discovered. That sole question was insufficient to permit defense counsel to construct a record from which to argue why the fourteen (14) hour period prior to the test was important. From the viewpoint of the jury, counsel might merely have been

embarking on a fishing expedition. The jury may have believed that defense counsel sought to harass, humiliate and embarrass the Complainant in direct contravention of the statutory intent.

Davis provides a two part test to establish whether Petitioner was denied his right under the Confrontation Clause to adequately cross-examine Complainant. First, whether Petitioner was precluded from engaging in effective cross-examination. Second, whether the permitted cross-examination was sufficient to elicit the information relevant to support the defendant's case.

Three factors must be considered: (1) whether the excluded questions were constitutionally protected; (2) whether the excluded questions were probative to the issue of the presence of sperm;

and (3) the importance of the witness' direct testimony. The goal of the inquiry was to elicit testimony regarding the sexual activity in a limited time period, not of bad character. Thus the line of questioning is within the defendant's right of cross examination and in contravention to the State's interest of limiting evidence of the character or reputation of a rape complainant. To rebut direct evidence and to bring out and weaken impact facts related to facts elicited on direct examination is also within a constitutionally protected right to confrontation of witnesses. The questions excluded were probative on the issue that during the fourteen (14) hour period of the viability of sperm, the activity of complainant was such as to provide opportunity and means

to be accessible for sexual contact with other than the Petitioner. The importance of the witness' testimony is critical where it is needed on the State's part to convict and reciprocally to provide the link of proof needed to cast a reasonable doubt on the alleged guilt of the defendant.

Notwithstanding these reasons, the existence of a constitutional violation cannot be predicated on an evaluation of the abstract probativeness of a particular type of evidence, but upon whether the defendant was prevented from presenting evidence which would have been effective in his case.

Upon a factual determination that an effective cross-examination did not occur, the balance of interests shows that no countervailing State interest is paramount to the Petitioner's right

of effective cross-examination in the instant case. In Davis, the trial court treated the statute protecting the witness' relevant juvenile record in order to preserve the anonymity of juvenile offender, essentially as a privilege. Petitioner contends that the trial court's application of the Rape Shield Statute to exclude Complainant's relevant testimony in order to prevent harassment of the Complainant is tantamount to a privilege.

Testimonial privileges are granted in various situations. The denial of or significant diminution of the right to confront and cross-examine a witness calls into question the ultimate integrity of the fact finding process and requires the competing interest (i.e., the privilege) to be closely

examined. Rather than merely determining whether the statutory prohibition of the Rape Shield Statute is rationally related to the State's interest, the Petitioner urges the Court to make an independent evaluation like the one in Davis to assess the State's need for the prohibition as applied to the facts in the case at bar. To test whether there is a rational relationship between the interest of the State and the statutory prohibition is only a superficial examination. Petitioner strongly refutes that the line of questioning which defense sought to pursue would humiliate or harass the Complainant. Disclosure of the Complainant's sexual activities in the limited time frame would result in only temporary embarrassment to her.

Petitioner does not challenge the legitimacy or wisdom of the State interest. Petitioner contends that there is simply a constitutionally insufficient nexus in this case between the assertion of the privilege and the protection of the State's interest. A constitutional right is violated when a privilege is asserted to deny effective cross-examination notwithstanding the strength of the nexus between the privilege and the State's interest underlying that privilege.

In Davis, the Court said: "The State cannot, consistent with the right of confrontation, require the Petitioner to bear the full burden of vindicating the State's interest..." 415 U.S. at 320.

Thus, the burden of any privilege falls with equal weight on the defendant, and the likelihood of injury to the defendant does not vary with the importance of the privilege or degree to which it fosters the relevant State policy. The assertion of any privilege violates the defendant's right to confront where it deprives him of an effective right to cross-examination. Petitioner contends the conflict in Requena could have been properly avoided through a prosecutorial choice between the State's two interests -- the assertion of a privilege through application of the Rape Shield Statute or the interest in the prosecution of the defendant. It was fundamentally unfair for the State to attempt to satisfy these two interests simultaneously at the expense of the

Petitioner's right to cross-examine and the trial court should have required the State to choose which interest to protect. The State had the option of protecting the interest underlying the privilege by refraining from using the Complainant to make out its case. A privilege must yield where its assertion by a witness would foreclose the defendant from continuing a constitutionally protected line of inquiry. Davis v. Alaska, 415 U.S. 308 (1974).

Further, there is no less restrictive alternative available that would have allowed the defense to cross-examine without forcing the State to forego the benefits from the assertion of the privilege. For instance, since the facts in Requena did not involve the assertion of a Fifth

Amendment privilege, a grant of use of immunity would not have enabled the State to compel the Complainant to testify without subsequent prosecution. Not all privileges are amenable to a less restrictive alternative to achieve equivalent results. The Complainant in a rape case is the critical witness and will always testify. The importance of the State's interest, to prosecute, and the degree to which the privilege, the statutory effect, serves the interest and the importance of the witness to the prosecution's case, indispensability, may properly be taken into account in making this determination. All that the confrontation clause of the Sixth Amendment requires is that the privilege not be asserted at the expense of the right to effective cross-examination.

Assuming arguendo, that the Petitioner's case is a difficult one in which there is a strong nexus between the assertion of the privilege and the protection of the State interest and in which there is available no less restrictive alternative, to deny cross-examination on a fourteen (14) hour period of time introduced by the State in its evidence of live spermatozoa present in the vagina of the Complainant is to foreclose the Defendant from making a meaningful record of the sexual activity of the Complainant in the operative time frame of the prosecution per se. The prosecution must prove guilt beyond a reasonable doubt. To restrict the defense's making of a record that will demonstrate to the trier a reasonable doubt as to the guilt of the defendant

is to deny the constitutionally protected right to effective cross-examination. Only when the defendant is permitted to bring out all possible probative evidence on cross-examination that rebuts or qualifies the testimony of the prosecution witnesses will a criminal trial be in constitutional compliance.

The constitutional challenge of a statute as applied must be determined on a case by case basis. While the Illinois Courts have in other cases held that the Rape Shield Statute was constitutionally applied, these cases have no bearing on the facts to which the statute was applied in Petitioner's case. In People v. Buford, _____ Ill.App.3d _____, _____ N.E.2d _____, (First Dist. Oct. 26, 1982), the defendant challenged the

constitutionality of the statute as applied. The Court held that the statute in its application to the defendant was constitutional. In that case defendant sought to admit prior conviction of Complainant for prostitution to show bias. It is distinguishable from the facts in Requena because the Illinois Rape Shield Statute does not preclude cross-examination of the prior sexual activity of the Complainant with the accused and defendant brought out the extensiveness of their previous relationship of prostitute and client.

Petitioner Requena sought not to question Complainant about her sexual character but only her sexual activities in the fourteen (14) hours prior to the discovery of the presence of spermatozoa in her vagina. In that

manner the intent of the statute, to prevent harassment, would not have been violated and an effective constitutionally protected cross-examination would have resulted.

PETITIONER'S EQUAL PROTECTION RIGHTS
WERE VIOLATED WHEN THE TRIAL COURT
APPLIED THE RAPE SHIELD STATUTE TO
RESTRICT DEFENSE'S CROSS-EXAMINATION
OF THE COMPLAINANT.

The right to confront witness is fundamental to our constitutional system of due process of law. There is no doubt that the right of cross-examination is included in the right of the accused in a criminal case to confront the witness against him. Pointer v. Texas, 380 U.S. 400 (1965).

Petitioner contends that the trial court's application of the Rape Shield Statute deprived him of the fundamental

right to confront and cross examine the Complainant. Since the application of the Statute has deprived the Petitioner of this fundamental right, the statute must promote an overriding or compelling interest of the government in order to be valid.

To insure that the witness does not feel embarrassed by the intimate substance of the testimony the Rape Shield Statute classifies the Petitioner and others similarly situated for a different burden than other defendants in criminal cases. For example, a person charged with murder is allowed to present evidence regarding the deceased's character whenever he has put the deceased's character in issue, as is the effect of raising the issue of self defense. People v. Moore, 27 Ill.App.3d 337, 326 N.E.2d 422 (First

Dist. 1976); People v. Baer, 35 Ill.App.3d 391, 342 N.E.2d 177 (First Dist. 1976). The testimonial privilege which the statute creates to encourage rape victims to testify should be strictly scrutinized by the Court to ascertain whether it has a sufficient relationship to the interest of the State in prosecuting the defendant. The Rape Shield Statute denies the Petitioner as classified the equal protection of law guaranteed by the equal protection clause.

The equal protection clause mandates that rape defendants will be dealt with in a similar manner by the State. It does not reject the State's ability to classify persons in the creation and application of laws, but it does guarantee that those classifications will not be based upon

impermissible criteria or arbitrarily used to burden a group of individuals.

The Rape Shield Statute is an over-inclusive classification as applied because it restricts cross-examination rights of all rape defendants on the subject of the Complainant's prior sexual history, plus it restricts cross-examination by defendants who wish to cross examine complainants as to their prior sexual activity within a limited and relevant period of time. For example in the case at bar, the Petitioner was restricted as to his cross-examination of the Complainant's prior sexual history within the fourteen (14) hours prior to the discovery of evidence of spermatozoa in her vagina. The State on its direct examination of the Complainant had introduced against the Petitioner evidence of

spermatozoa in the vagina to prove penetration, a necessary element of its case. The classification of the Petitioner and those similarly situated cannot survive the Court's strict scrutiny as to its purported purpose. How can the application of the Rape Shield Statute further the State's interest in prosecution when relevant evidence is excluded that lessens the burden which the State is legally bound to uphold. Thus, there is no correlation between the statute as applied to the Petitioner as representative of his class and the prosecution burden to prove rape defendants guilty beyond a reasonable doubt.

If the Court does not believe that strict scrutiny is required to review the Rape Shield Statute as applied,

Petitioner contends that whenever legislation limits the exercise of a fundamental right by a class of persons the State is required to show a factually demonstrable rational relationship to a legitimate State end. As one commentator has noted:

"A classification is "neutral" whenever it treats persons in a dissimilar manner on the basis of some inherent human characteristic or status (other than racial heritage), or limits the exercise of a fundamental right by a class of persons. Whenever legislation involves a neutral classification, the Court will validate it only if it has a factually demonstrable rational relationship to a legitimate state end. Applying this demonstrable basis standard of review, the Court should validate a statute only if the means used bear a factually demonstrable relationship to a state interest capable of withstanding analysis. The Court will scrutinize

the factual support for the legislation to determine whether its ends are capable of withstanding analysis and whether its means are rationally related to that end." Nowak, 62 Geo.L.J. at 1093-4.

This standard of review is distinguishable from the conceivable basis standard. Under the conceivable basis standard, whenever legislation treats classes in a dissimilar manner but does not employ a prohibited or neutral classification as the basis of dissimilar treatment, the Court will uphold the legislation so long as there is any conceivable basis upon which the classification could bear a rational relationship to the state end. The Court will not review independently the factual basis of the end of the legislation or of the means employed.

In applying the factually demonstrable rational relationship, the Court can readily ascertain that the Rape Shield Statute has no factually demonstrable basis to the state interest. The Court's function as interpreter of our Constitution commands an independent review of the application of the statute to see what rights are accorded specific constitutional protection and to insure that these rights or classes are not subject to arbitrary limitation.

Petitioner incorporates, in support of his assertion that the statute as applied creates an arbitrary classification and an impermissible burden on his constitutional rights, the argument made in his Petition for Leave to Appeal to the Illinois Supreme Court (pages 19-21).

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered herein.

Respectfully Submitted,

GARLAND W. WATT
LAW OFFICES OF
GARLAND W. WATT
400 South Dearborn Street
Suite 500
Chicago, Illinois 60605
(312) 663-1440

December 3, 1982